88-49

No._____

In The

Supreme Court of the United States

OCTOBER TERM, 1987

Calvin Berry, III, et al.,
Petitioner

v.

The CITY OF DALLAS, Etc., et al.,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. WHETHER DALLAS CITY ORDINANCE NO. 19196, SECTIONS 41 A-2 (4), (A), (B), (C); SECTION 41 A-2 (17); (A), (B), (C), (D); SECTION 41 A-3 (1) THROUGH (9) SECTION 41 A-18 (a), (b), (c) ARE UNCONSTITUTIONAL AND VIOLATE THE FIRST, FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

2. WHETHER CITY OF DALLAS ORDINANCE NO. 19196 IS UNCONSTITUTIONAL AS AN INFRINGEMENT ON AN INDIVIDUAL'S RIGHT TO FREEDOM OF ASSOCIATION.

PARTIES

CALVIN BERRY, III, Petitioner-Plaintiff

SAUJAY PATEL, Petitioner-Plaintiff

RUDOLF FERNANDEZ, Petitioner-Plaintiff

DALLAS MOTEL ASSOCIATION, Petitioner-Plaintiff

CITY OF DALLAS, TEXAS, Respondent-Defendant

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Calvin Berry, III, Saujay Patel, Rudolf Fernandez and the Dallas Motel Association, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The judgment of the Court of Appeals was issued on February 12, 1988, affirming the judgment of the District Court. *FW/PBS, Inc. vs. City of Dallas*, 837 F.2d 1298 (Fifth Circuit 1988) (Appendix A). The judgment of the District Court was issued on September 12, 1986 granting respondent's motion for summary judgment. *Dumas vs. City of Dallas* 648 F. Supp. 1061 (N. D. Tex. 1986) (Appendix B).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1988. (Appendix A). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

APPLICABLE CONSTITUTIONAL PROVISIONS

The First, Fourth, Fifth, and Fourteenth Amendments of the United States Constitution pertain to this appeal.

STATEMENT

The Petitioners filed their original complaint as a civil action in the N District of Texas seeking a Temporary Restraining Order and a Permanent Injunction against Respondent, the City of Dallas, requesting that the Respondent be enjoined from enforcing the provisions of City of Dallas Ordinance No. 19196. Petitioners challenged Ordinance No. 19196 as being unconstitutional and violative of the First, Fourth, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution. Petitioners challenged Ordinance No. 19196 as being violative of the Equal Protection clause of the United States Constitution.

Since *FW/PBS, Inc., et al v. the City of Dallas, Texas, et al*, Civil Action No. CA3-86-1759-R, had been filed prior to petitioners filing their original complaint, the Court, by Order on August 4, 1986, consolidated all of the challenges to City of Dallas Ordinance No. 19196 and, by Order of August 6, 1986, set an accelerated schedule for oral argument on all Motions For Summary Judgment for oral presentation in September and, on September 12, 1986, the District Court filed its Memorandum Opinion granting Respondent's Motion For Summary Judgement. (Appendix D)

Respondents appealed to the Fifth Circuit Court of Appeals and that portion relating to adult motels was affirmed. *FW/PBS, Inc., v. City of Dallas*, 837 F.2d 1298 (5th Cir.1988) (Appendix A)

This Court, on May 4, 1988, entered an Order In Pending Case

which granted a stay and stayed the judgment of the United States Court of Appeals for the Fifth Circuit, except for the holding that the provisions of the ordinance regulating the location of sexually-oriented businesses do not violate the Federal Constitution.

REASONS FOR GRANTING THE WRIT

A. THE CHALLENGED ORDINANCE VIOLATES THE FIRST, FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This is a case of first impression before this court. Research indicates that the case of *Patel and Patel v. City of South San Francisco*, 606 F.Supp. (N.D. Cal.1985) is the only decision that concerns adult motels.

It is Petitioners' position that neither the District Court nor the United States Court of Appeals for the Fifth Circuit has addressed the adult motel issue in a meaningful manner. The District Court referred to the adult motel issue only in the following instances:

Dumas v. City of Dallas, 648 F. Supp. 1061, 1064 (N.D. Tex.1986), where the Court stated:

> Five members of the 15-member Commission and four of the 11 members of the council stated unequivocally -- to no dissent -- that the Ordinance was concerned solely with controlling the secondary effects of sexually-oriented businesses on surrounding neighborhoods. (Footnotes omitted)

Dumas v. City of Dallas, 648 F.Supp. 1051, 1066-67 (N.D. Tex.1986), where the Court stated:

> The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the ordinance: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theaters; (6) adult theaters; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the ordinance. (Footnote omitted)

> Adult motels, for example, will be restricted to renting rooms for at least 10 hours rather than the two-hour period, now -- thus cutting income by up to 80 percent.

Dumas v. City of Dallas, 648 F.Supp. 1061, 1076 (N.D. Tex.1986), where the Court stated:

> The city did indeed make sufficient findings to justify restrictions on adult motels, see ante at 4 n. 9 (statement of Ms. Ragsdale), compare df., *Patel and Patel vs. South San Francisco*, 606 F. Supp. 661, 671 (N.D. Cal. 1985) (no findings); moreover, recent pronouncements of state power to regulate morality and private consensual activity are probably broad enough to encompass regulations on adult motels. See *Bowers v. Hardwich*, -- U.S. --, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986) (no privacy right to consensual homosexual, and, heterosexual sodomy); *Baker v. Wade*, 769 F.2d 289 (5th Cir. 1985) (en banc), *Cert. Denied*, -- U.S. --, 106 S. Ct. 3338, 92 L. Ed. 2d 742 (1986) (Footnote omitted.)

The United States Court of Appeals for the Fifth Circuit had one paragraph that relates to Petitioners, when it stated in *FW/PBS, Inc., v. City of Dallas*, 837 F.2d 1298, 1304 (5th Cir. 1988) as follows:

> {4} The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

These are the only references to adult motels by the District Court and the Fifth Circuit Court of Appeals.

The "sufficient findings to justify the restrictions on adult motels" cited by the District Court are contained in Respondent's Exhibit 17 (Defendant's Exhibit 17) (Attachment D), which was a Dallas City

Council meeting on June 18, 1986. The only finding, testimony, or any reference to adult motels was by City Councilwoman Ms. Ragsdale, who stated as follows:

> This ordinance, particularly with respect to the motels and the proliferation of motels in the southern sector and which are in close proximity to churches, residences, as well as schools, continue to not only increase the crime but also just the neighborhood is becoming viciously angry at the presence and the ongoing presence of these given -- of these given facilities within the area. . . . It will do the following for those who have come to speak regarding the motels and most of those individuals who did come down regarding Cedar -- regarding the motel on Mouser and Cedar Crest happened to be in the district that I represent. It will do the following: Number one, motels -- motel rooms should not lease or rent for less than twelve hours. Number two, if motels are in close proximity, meaning a thousand feet within a residence or within church, within school, then over a three-year period these motels should be phased out. If they are caught--during the interim, if they are caught violating the law, of course, then their license can be revoked.

This statement by Councilwoman Ragsdale is the only evidence as relates to the adult motels and it provided for twelve-hour rental periods. The record will reflect that because American Airlines has a contract with Loews Anatole Hotel for its pilots and flight attendants to lay over in not less than ten hour increments, the challenged Ordinance was subsequently changed to the ten hour time period.

Petitioners would show that the Respondent failed to introduce any evidence of studies establishing that so-called "adult motels" either increase the incident of crime in the neighborhoods where they are located or that they contribute to urban blight or that they adversely affect property values. As stated, to date, other than *Dumas v. City of Dallas*, the only case is *Patel and Patel v. City of South San Francisco*, 606 F.Supp. 666 (N.D. Cal.1985). In the *Patel* case, the motels were equipped with T.V. sets having access to sexually explicit programs. In 1982, the City of South San Francisco enacted an ordinance similar to the one at issue in the instant case. The purposes of the South San Francisco ordinance were likewise similar to those of

the Dallas ordinance. Just as in the instant case, the City of South San Francisco ordinance failed to produce any evidence of any connection between the stated purposes of the ordinance and the regulation of the motel businesses. The District Court held the ordinance unconstitutional under the First Amendment of the United States Constitution as applied to the motels because of a lack of justification for including the so-called "adult motels" in the ordinance's definition of "adult entertainment businesses." Petitioners' motels have similar operating methods as were found in the motels in the *Patel* case. Petitioners' motels offer two hour rates, a fact which was not present in *Patel*, but there is no justification for distinguishing between motels in the City of Dallas which offer only ten-hour rates and are not regulated by the Ordinance and Petitioners' motels which are so regulated. There has been no evidence presented that the offering of two-hour rates enhances the incidence of crime, urban blight, or plummeting property values any more than a ten-hour rate would so do.

The Dallas "sexually-oriented business" ordinance is unconstitutional because it is vague and overbroad in its definitions wherein it includes the definition of an adult motel. The definition in that aspect of the Ordinance which relate to motels is found at Section 41 A-2, (4); Section 41 A-2 (17); Section 41 A-2 (19); Section 41 A-3 (4); and Section 41 A-18. (Appendix D)

It is Petitioner's contention that the Dallas Ordinance is unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The activities of the motel are protected by the Fourteenth Amendment as commercial free speech, and there must be a reason for regulating one entity in a given class of motels and not regulating other entities in the same class of motels.

Petitioners contend that Section 41 A-18, in its entirety, is violative of the Fifth and Fourteenth Amendments to the United States Constitution and that said Section deprives the owners of their property without due process of law in that Section 41 A-18 restricts the public's access to motel space and unconstitutionally restricts adult activity and activity by others and access to motel space in violation of the Constitution. Section 41 A-18, in its entirety, constitutes an impermissible prior restraint and is designed and calculated to unlawfully eliminate

Petitioners' ability to conduct business and is an attempt to censor adult-oriented activities by the City of Dallas in the City of Dallas. This Section, 41A-18, is in violation of the mandate a ticulated in the case of *E & B Enterprises v. City of University Park*, 449 F. Supp. 695 (N.D. Tex., 1977), in that, upon information and belief, no studies of any kind were conducted by the City of Dallas regarding the necessity of enacting an ordinance of this type that seriously affects the ability of Petitioners to operate a business which is protected by the Constitution.

Petitioners contend that this Ordinance was enacted to unlawfully censor adult-oriented activity in the City of Dallas and that this Ordinance fails to pass constitutional muster in accordance with the law as mandated by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968).

B. THE CHALLENGED ORDINANCE IS AN UNCONSTITUTIONAL INFRINGEMENT ON INDIVIDUAL FREEDOM OF ASSOCIATION.

Petitioners contend that the challenged ordinance is unconstitutional as an infringement on the individual's right to freedom of association. The right to associate freely and to go "where one pleases" is a protected freedom under the First Amendment and a substantive guarantee of due process under the Fourteenth Amendment, Clause 1. *Aladdin's Castle, Inc., v. City of Mesquite*, 630 F. 2d 1029 (5th Cir. 1980), Reh. den., 634 F. 2d 1355, reversed in part on other grounds, 102 S. Ct. 1070 (1982).

Petitioners contend that the constitutional right to freely associate is not limited to those associations which are political in the customary sense but include those which pertain to the social, legal and economic benefit of the members. In this regard, the freedom of individuals of the opposite sex, or individuals of the same sex, or families with children of different sexes have the right to freely associate in a motel room owned by the Petitioners and have the right to check out within any given period of time or to stay as long or as short as they desire. *See Sawyer vs. Sandstrom*, 615 F.2d 311 (5th Cir. 1980); *Gilmore v. City of Montgomery, Alabama*, 94 S. Ct. 2416, 417 U.S. 556, 41 L. Ed. 2d 304 (1974).

Petitioners contend that the challenged Ordinance is constitutionally infirm because it is an enactment which criminalizes ordinary associational conduct not constituting a breach of the peace as recognized by the State of Texas. *Familias Unidas v. Briscoe*, 619 F. 2d 391 (5th Cir. 1980).

CONCLUSION

Petitioners move the Court to grant the Writ of Certiorari, vacate the judgment of the Court of Appeals, and declare the City of Dallas Ordinance No. 19196, as relates to "adult motels" unconstitutional and unenforceable.

Respectfully submitted,

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By:
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify the true and correct copy of the attached petition for Writ of Certiorari for petitioners on this day has been mailed to the following Attorneys of Record in this case by Certified Mail, Return Receipt Requested:

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Signed this _____day of June, 1988.

Frank P. Hernandez

FW/PBS., Inc.)
Petitioner)
) NO._____
V.)
)
City of Dallas)
Respondent)

AFFIDAVIT OF COUNSEL AS TO MAILING PETITION OF WRIT OF CERTIORARI

I, Frank P. Hernandez, Counsel for Calvin Berry III, et al, Petitioner, swear that the foregoing Petition was deposited in the United States mail with the proper postage, prepaid, on June _____ 1988.

_____
Frank P. Hernandez

STATE OF TEXAS)
)
COUNTY OF DALLAS)

SWORN TO AND SUBSCRIBED before me, a notary public, by the said FRANK P. HERNANDEZ, on this the _____ day of June 1988, to certify which witness my hand and seal.

_____
Notary Public in and for
The State of Texas

My Commission Expires:

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 86-1723

FW/PBS, INC., Etc., et al.,

Plaintiffs-Appellants,

versus

The CITY OF DALLAS, Etc., et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before THORNBERRY, GARWOOD and HIGGINBOTHAM, Circuit Judges.

PATRICK E. HIGGINBOTHAM,

Circuit Judge:

In the early summer of 1986, the City of Dallas, Texas began to consider the regulation of the effects of sexually oriented businesses upon the community. After study of similar efforts by other metropolitan cities, the City Council passed a detailed ordinance that imposed licensing and zoning restrictions upon sexually oriented businesses. A variety of businesses that would be subject to its regulations attacked the Ordinance in three separate federal suits. Each of the three suits

asked the district court to enjoin enforcement of the Ordinance and declare it unconstitutional. The suits were consolidated and the case was submitted for decision on motions for summary judgment filed by all parties. The district court, with exceptions not complained of here, upheld the Ordinance in a detailed written opinion.[1]

These plaintiffs appeal urging that the district court erred in two main regards. First, plaintiffs allege that the licensing provisions are content-based regulations, a prior restraint upon activity protected by the first amendment, and invalid because they lack the required procedural protections for such regulation. Second, plaintiffs complain that the court was wrong to conclude that reasonable alternative locations are available for existing businesses forced to move by the Ordinance, an inadequacy that denied their rights under the first and fourteenth amendments. Plaintiffs also make more specific attacks to the Ordinance. They urge that the licensing scheme is unconstitutional because it fails to limit the discretion of the Chief of Police, the licensing official, and because it disqualifies persons based on their criminal record.

We are not persuaded that the district court erred in its rejection of the constitutional attack and affirm. Other and more narrow attacks upon specific provisions of this ordinance were also made. We will explain these contentions and our reasons for affirming their rejection in due course.

I

The Ordinance subjects sexually oriented businesses to zoning and licensing requirements. A business must be at least 1000 feet from another sexually oriented business or a church, school, residential area, or park. Such businesses must also obtain a license issued by the Chief of Police and permit inspection of their premises when open or occupied. A license is not available to persons formerly convicted of specified crimes, such as promotion of prostitution. The ordinance also requires that viewing rooms in adult theatres be configured to allow visual surveillance by management.

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1. *See Dumas v. City of Dallas*, 648 F.Supp. 1061 (N.D.Tex.1986).

The ordinance recites that its purpose is to promote health, safety and morals, and to prevent the "continued concentration of sexually oriented businesses." It disclaims any purpose to deny "access by adults to sexually oriented materials protected by the First Amendment."

The city attorney first presented the Ordinance to the Dallas City Plan Commisssion. The Plan Commission heard testimony from supporters as well as opponents of the Ordinance. The Commission considered studies of other cities regarding the relationship among concentrations of sexually oriented businesses, crime and property values, but did not conduct studies of Dallas itself. The Plan Commission did, however, consider a study of alternative locations within Dallas for the affected businesses. On the basis of its findings, the Plan Commission unanimously recommended that the City Council adopt the Ordinance.

The Council unanimously adopted the Ordinance after making a number of findings. It considered the same studies as well as a study conducted by the Dallas Police Department that concluded that crime rates are 90% higher in adult districts. The Council concluded that public health and safety required regulation of these businesses because they "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature"; that there have been a substantial number of arrests for sex-related crimes near these businesses: and that the evidence that these businesses are associated with "urban blight" and declining property values is well documented.

II

We first examine the district court's exercise of jurisdiction and the standing of the plaintiffs. Seven of the nine types of sexually oriented businesses regulated by the Ordinance are represented by at least one plaintiff. These plaintiffs include adult arcades, adult bookstores, adult video stores, adult cabarets, adult motels, adult motion picture theaters, and nude model studios. Only escort agencies and sexual encounter centers are not before the court and we do not decide the constitutionality of the Ordinance as it applies to them. Nor do we decide whether the Ordinance may constitutionally reach businesses that sell

sexually-oriented reading materials or videos solely for use off the business' premises. Each of the book and video stores before us also offered on-premises consumption of sexually oriented materials.

There is no question but that this is a genuine and not a hypothetical controversy. The plaintiffs are subject to the terms of the Ordinance and obedience to its terms will limit business in ways that will result in economic loss as well as a loss of freedom to engage in acts that enjoy some measure of protection under the first amendment.

We also are not persuaded that there is a basis for abstention. There were no pending state proceedings, none have been instituted, and we are not pointed to any possible construction of the Ordinance by state courts that might make imprudent our exercise of jurisdiction.

III

[1] Plaintiffs contend that the licensing scheme must fail for several related reasons. First, they argue that insisting on a license for sexually oriented businesses regulates the content of expression protected by the first amendment without the procedural protections of *Freedman v. Maryland*,[2] and *Fernandes v. Limmer*.[3] The ordinance is said to suffer three procedural deficiencies: it places the burden of proof upon the licensee to prove that a license was wrongfully denied; it fails to provide for prompt determination of the appeal; and it fails to provide assurance of a "prompt final judicial determination."

We are not persuaded that this ordinance requires such procedural safeguards for its validity. The argument assumes that the Ordinance licensing scheme regulates protected activity in a way that triggers the procedural requirements of *Freedman*. The ultimate issue in *Freedman* was the constitutionality of Maryland's motion picture statute. Maryland made it unlawful to distribute or exhibit films unapproved by a Board of Censors. Maryland did not provide for judicial participation or otherwise assure prompt review in its procedure although its board could bar the showing of a film. The court held that this prior

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2. 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965).

3. 663 F.2d 619 (5th Cir. 1981), *cert. dismissed*, 458 U.S. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982).

restraint can avoid constitutional infirmity only if hedged by procedural safeguards designed to obviate the dangers of a censorship system. The court concluded that these safeguards include the state's shouldering of the burden of persuasion, a "procedure requiring a judicial determination..." and restriction of prior restraint to the shortest fixed period compatible with sound judicial resolution.[4]

We applied *Freedman* in *Fernandes* to strike down a regulation of the Dallas-Fort Worth Airport Authority denying followers of the Krishna religion a license to solicit at the airport. We rejected the suggestion that the regulation was sufficiently content-neutral to escape the procedural requirements of *Freedman*: "Although D/FW's regulatory ordinance purports to be content-neutral, the consequences flowing from a permit denial here are essentially the same as those addressed in *Freedman*: to an unsuccessful permit applicant, the unavoidable delay posed by judicial review is tantamount to an effective denial of First Amendment rights."[5]

A license from the airport authority was necessary in order to solicit for religious purposes in a public forum. There was no finding that the restraint of protected first amendment activity was narrowly tailored to the regulation of any untoward consequences and no findings that the protected conduct had consequences regulable by the state under its police power. Stated more directly, the airport authority was seen as controlling a religious group's access to a public forum without justification. We concluded that *Freedman*'s protections were required but absent.

In *Fernandes* we did not apply the time, place and manner analysis of *Young v. American Mini Theatres, Inc.*[6] There the Supreme Court faced a zoning scheme similar to the Dallas Ordinance. It prohibited locating an adult theatre within 1,000 feet of any two other 'regulated uses' or within 500 feet of any residential zone. Although a majority of the Justices voted to uphold the regulation, five could not agree on a single rationale.

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4. Id. 380 U.S. at 58-59, 85 S.Ct. at 738-39.

5. 663 F.2d at 628.

6. 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310 (1976).

Four years after our decision in *Fernandes*, however, a majority of the Supreme Court settled on a time, place and manner rationale for zoning an activity that is sexually oriented but not obscene. In *City of Renton v. Playtime Theatres, Inc.*[7] the Court reviewed a zoning ordinance enacted by Renton, Washington that prohibited adult motion picture from locating within 1,000 feet of any residential zone, single or multiple-family dwelling, church, park or school.[8] Characterizing the *City of Renton* ordinance as a time, place or manner restriction, the Court found the first amendment satisfied because the city had a substantial interest in regulating sexually oriented businesses and did so without restricting alternative avenues of communication.[9]

We applied *City of Renton* to a licensing scheme substantially similar to the Dallas Ordinance in *SDJ, Inc, v. City of Houston*.[10] On the basis of *City of Renton*, we upheld the Houston ordinance against a facial first amendment challenge. The opponents of the Ordinance, however, made no attack to the procedural protections in the Ordinance. Nevertheless, the *City of Renton* and *City of Houston* decisions guide our analysis of the procedural protections the City of Dallas must provide here.

[2] Most important, these decisions recognize that a city may regulate the effects of sexually oriented businesses without engaging in content-based regulation. The *City of Renton* Court found no reason to apply rigorous content-based analysis where a city's "predominant concern" is to control the negative effects of a certain kind of business rather than to suppress a certain type of speech.[11] In addition, the court held that sexually explicit materials deserve less first amendment protection than other kinds of speech.[12] In short, to the extent that *Fernandes* reaches Dallas' present zoning regulation, it is limited by the *City of Renton* decision; the first amendment protection required for religious activity, including proselytizing and solicitation of

7. 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

8. *Id.* 106 S.Ct. at 925-27.

9. *Id.* at 930-32.

10. — F.2d —, (5th Cir. 1988).

11. *City of Renton*, 106 S.Ct. at 930.

12. Id. at 929-30 n. 2.

money, is of a different order than the protection due sexually oriented businesses.

We find that the Dallas Ordinance, like the Ordinance before the Court in *Renton*, regulates only the secondary effects of sexually oriented businesses. For this reason, the Ordinance need only meet the standards applicable to time, place, and manner restrictions and need not comply with *Freedman*'s more stringent limits on regulations aimed at content.

This is not to say that the lower level of protection provided in *City of Renton* inevitably excludes the procedures required by *Fernandes*. In this case, however, those procedures were not necessary insofar as the Dallas Ordinance regulates a business engaged in an activity subject only to the lesser protection. *Fernandes* procedures are less important when a regulation restricts the conduct of an ongoing commercial enterprise. What is being limited here is not a particular movie -- as in *Freedman* -- nor episodic solicitation efforts -- as in *Fernandes* -- but a long-term commercial business. The ongoing nature of the regulation provides a strong incentive for the business operators to seek review of licensing decisions, even if that review is not given immediately.[13] We do not decide today whether *Fernandes* procedures apply to lesser-protected activities conducted outside the realm of an ongoing commercial enterprise.

We are also satisfied that the Ordinance is valid on its face. Because the Ordinance in *City of Renton* was a content-neutral time, place or manner restriction, the Supreme Court required only that it be "designed to serve a substantial government interest" and allow for "reasonable alternative avenues of communication."[14] The Dallas Ordinance meets both those requirements. Like the *City of Renton* ordinance, the Dallas law was designed to serve the City's interest in maintaining "the quality of urban life."[15] The City Council's consideration of the criminal effects of concentrated sexually-oriented

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13. *Cf. Freedman*, 380 U.S. at 59, 85 S.Ct. at 739 (noting that "[t]he exhibitor's stake in any one picture may be insufficient to warrant a protracted and onerous course of litigation").

14. *City of Renton*, 106 S.Ct. at 930.

15. *Id.* at 930.

businesses was thorough, as was its review of the effects such concentrations have on property values. In short, Dallas has demonstrated that the Ordinance furthers a substantial government interest.

The Ordinance also allows reasonable alternative avenues of communication. In *Basiardanes v. City of Galveston*,[16] we held that an ordinance restricting adult theatres to locations that were "poorly lit, barren of structures suitable for showing films, and perhaps unsafe," did not provide adequate alternative location. Here, however, the City offered evidence that convinced the district court that the alternative sites are feasible locations and not just open areas on a city map. Putting aside the question of the deference the district court owed the findings of the city council regarding alternative locations, it had evidence before it sufficient to sustain its findings. Plaintiffs suggest that such findings are inappropriate for deciding a motion for summary judgment. Perhaps that is so, and we express no opinion in this regard. However, the parties submitted the case for decision on the record and the record supports the district court's findings regarding the number of alternative locations.

IV

We also are not convinced by the other constitutional attacks against the ordinance's licensing provisions. Appellants rely on several different constitutional provisions in their challenge: they attack three specific license requirements as prior restraints under the first amendment, they contend that the Ordinance's grant of discretion to the police chief violated the first amendment's prohibition on vagueness, and they argue that the Ordinance's inspection-consent provision violates the fourth amendment's limitations on searches as well as the first amendment. We deal with these attacks in turn.

A

As a threshold matter, we note that the *City of Renton* standard on review applies to the details of the licensing scheme -- as opposed to the zoning rules -- even though the licensing scheme may regulate aspects of the businesses' operations other than location. The kind of speech affected by the license requirements and the city's justification

16. 682 F.2d 1203, 1214 (5th Cir.1982).

for enforcing them are the same for both kinds of restrictions. Whether a license is denied because the business is improperly located or because the business is improperly maintained, the effect is the same -- the operator must refrain from the activity and his only alternative is to comply with the Ordinance and obtain a license.[17] Indeed, as the very title of the doctrine suggests, "time, place or manner" analysis cannot be limited solely to regulation of "place."

[3] On this basis we hold, in accordance with the prevailing view, that the first amendment does not prohibit the City of Dallas from requiring that viewing booths in adult theatres be open.[18] Although this requirement is based on slightly different considerations than those that support the zoning requirements, the public purpose involved is no less substantial. The City could reasonably conclude that closed booths encourage illegal and unsanitary sexual activity in adult theatres. The substantial government interest in curbing such effects supports the open booth requirement as a valid restriction under *City of Renton* standards.

[4] The owners of adult motels make a separate challenge to the Ordinance provision prohibiting rental of a motel room for less than ten hours at a time. The motel owners allege that the City made no finding that adult motels engender the same effects on property values and crime as do other sexually oriented businesses. Once again, however, we find the City's interest to be self-evident and substantial. It is certainly within reason that short rental periods facilitate prostitution, one of the criminal effects with which the City Council was most concerned.

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17. Contrary to Judge Thornberry's dissent, *see post* at 2003, *Fernandes* did not hold that a licensing scheme may never be used to implement a valid time, place or manner restriction on speech activity. Rather, *Fernandes* held that a delay in judicial review of a license denial itself impermissibly infringed on the applicant's right to speak for the duration of that delay. 663 F.2d at 628. The fact that this delay occurred in the context of licensing was not important to the court's decision. More on point is the pre-*Renton* decision, *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980). There the court upheld a zoning provision scattering adult businesses pursuant to a finding by the City of Peoria that concentrations of such businesses eroded neighborhoods. Notably, *Genusa* accepted the proposition that licensing requirements be treated under the same analysis as zoning. *See id.* at 1212.

18. *See Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir.1986); *Eilwest Stereo Theatres, Inc. v. Wenner*, 681 F.2d 1243, 1246 (9th Cir. 1982)

[5] Appellants also attack the Ordinance provision that denies licenses to persons convicted of certain crimes.[19] Arguably, it is awkward to analyze this occupational disability as a time, place or manner restriction within the *City of Renton* framework. This part of the Ordinance does not simply regulate the manner of protected activity, it denies the right of persons convicted of certain crimes to engage in the regulated businesses.

Proceeding in categorical terms sheds little light on the standard of review we should apply, although we can imagine three possibilities. First, we might subject the provision to the strict level of review reserved for content-based regulation, and require the city to show that the provision is precisely drawn to serve a compelling interest.[20] Second, we might apply *City of Renton*'s approach and require that the provision serve a substantial government interest while leaving open alternative avenues of communication. Finally, although the provision might not be considered content-neutral, the fact that it impinges on a lesser-protected category of speech might justify the application of some intermediate standard of review, particularly when the regulation is a form of disability commonly attending convictions.

A strong argument can be made that we need not determine which standard of review is most appropriate because the provision can in any event withstand strict scrutiny; that the city's findings demonstrate a compelling interest in limiting the involvement of convicted persons in the operation of sexually oriented businesses; that by documenting the strong relationship between sexually-oriented businesses and sexually related crimes, the city established a compelling justification for barring those prone to such crimes from the management of these businesses. The argument would continue that the city's findings conform with the well-accepted notion that the government may attach to criminal convictions disabilities aimed at preventing recidivism.[21]

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19. These included a variety of prostitution offenses; obscenity; sale, distribution, or display of harmful material to a minor; sexual performance by a child; possession of child pornography; public lewdness; indecent exposure; indecency with a child; sexual assault; aggravated sexual assault; and incest, solicitation of a child, or harboring a runaway child.

20. *See Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 541, 100 S.Ct. 2326, 2335, 65 L.Ed.2d 319 (1980).

While compelling necessity might be a proper standard to measure regulation disabling a person with full participatory rights of citizenship, on balance we are persuaded that only a substantial relationship need be shown between the conviction and the evil sought to be prevented. The courts have not engaged in such strict scrutiny or otherwise required compelling necessity to justify other occupational bars attending a criminal conviction, including those laced with activity protected by the first amendment such as labor organizing. In short, the City need only show that conviction and the evil to be regulated bear a substantial relationship.

We agree with the district court that the Ordinance is now sufficiently well tailored to achieve its ends. Ineligibility results only from offenses that are related to the kinds of criminal activity associated with sexually oriented businessess.[22] In addition, the Ordinance permits licensing of former offenders after enough time has passed to indicate they are no longer criminally inclined, and takes into account the seriousness of applicant's offenses.[23] The relationship between the offense and the evil to be regulated is direct and substantial.

This result also is consistent with our decision in *Fernandes*. The ordinance challenged in *Fernandes* denied a permit to anyone convicted of an offense involving moral turpitude. Yet, in *Fernandes* there was no immediate relationship between crimes of moral turpitude and the purpose of the airport's ordinance.[24]

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21. *Cf. DeVeau v. Braisted*, 363 U.S. 144, 158-59, 80 S.Ct. 1146,1154, 4 L.Ed.2 1109 (1960) (plurality opinion) ("Barring convicted felons from certain employments is a familiar legislative device to insure against corruption in specified, vital areas."); *106 Forsyth Corp. v. Bishop*, 482 F.2d 280, 281 (5th Cir.1973) (per curiam) (first amendment permits revocation of theatre license for violation of law against sexually explicit screenings), *cert. denied*, 422 U.S. 1044, 95 S.Ct. 2660 45 L.Ed.2d 696 (1975).

22. The district court scrutinized the list of crimes that would make an applicant ineligible for a license and invalidated those it found to have no relationship to the purpose of the Ordinance. These offenses included kidnapping, robbery, bribery, controlled substances violations, and "organized criminal activities." *Dumas*, 648 F.Supp. at 1074.

23. An individual convicted of a specified misdemeanor becomes eligible for a license two years after the conviction or end of confinement, whichever is later; for felonies or multiple misdemeanors the period is five years.

B

[6] We also agree with the district court that the Ordinance does not give impermissibly broad discretion to the Chief of Police in issuing, suspending, and revoking licenses. Among other things, the Ordinance empowers the Chief of Police to require "reasonably necessary" information in a license application, to deny a license for failure to comply with "applicable [health, fire and building] laws and ordinances," and to revoke a license if the licensee gave "false or misleading information" in the application or has "knowingly" permitted illegal conduct on the premises.[25]

As these examples demonstrate, the Ordinance relies on standards that are "susceptible of objective measurement" and thus consistent with the first amendment.[26] The factual basis necessary for each of these determinations is either implicitly obvious, as in what constitutes "false" information or information "reasonably necessary" for an application, or ascertainable through reference to other sources of law, as in what constitutes a violation of health laws or knowledge of illegal conduct.[27]

C

[7] Finally, plaintiffs attack the Ordinance provision permitting the inspection of a licensed business whenever the premises are occupied

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24. *See* 663 F.2d at 630.

25. Although the district court left these provisions standing, the court invalidated two sections of the ordinance as unduly discretionary. One provision denied a license to applicants who have been "unable to operate or manage a sexually oriented business in a peaceful and law-abiding manner." The other permitted issuance of a license to applicants who, although previously convicted of a crime, are "presently fit to operate a sexually oriented business." *See Dumas*, 648 F.Supp. at 1072-73. The district court struck these parts from the ordinance, so they are not before us.

26. *See Keyishian v. Board of Regents*, 385 U.S. 589, 604, 87 S.Ct. 675, 684, 17 L.Ed.2d 629 (1967); *Kunz v. New York*, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280 (1951).

27. *See SDJ, Inc. v. City of Houston*, *supra* (upholding similar ordinance provision).

or open for business.[28] We reject the argument that this provision violates the fourth amendment prohibition against unreasonable searches. Under the administrative search doctrine, searches to enforce regulatory standards may be reasonable in light of reduced expectation of privacy in a pervasively regulated business.[29]

Communities have long been concerned about the effects of sexually oriented businesses and have attempted to cope with those effects through regulation. Indeed, in light of this history of regulation we rejected a facial fourth amendment attack to an ordinance permitting warrantless searches of licensed massage parlors.[30] We hold that sexually oriented businesses face a degree of regulation that renders the inspection provision presumptively reasonable.

[8] Nor do we find the inspection provision unduly burdensome under the first amendment. The power of the city to inspect for violations does not enhance the Ordinance's suppressive effect, for the city may revoke a license only for non-compliance with substantive provisions we have determined to be consistent with *City of Renton* standards. Rather, the city has a substantial interest in enforcing the Ordinance and the inspection provision is well tailored to serve that interest.

AFFIRMED.

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28. Judge Thornberry would invalidate the requirement that licensed businesses comply with the city's health, fire and building codes as a restraint of speech unrelated to the city's stated purposes. We do not reach this issue because the Appellants' only stated attack to the code-compliance requirement was that it vested too much discretion in city officials. We have dealt fully with this argument, but we will not consider others not presented to us.

29. *See United States v. Biswell*, 406 U.S. 311, 316, 92 S.Ct. 1593, 1596, 32 L.Ed.2d 87 (1972); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313, 98 S.Ct. 1816, 1820-21, 56 L.Ed.2d 305 (1978).

30. *See Pollard v. Cockrell*, 578 F.2d 1002, 1014 (5th Cir.1978).

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CA3-86-1759-R

FW/PBS, INC., Etc., et al.,

Plaintiffs-Appellants

versus

The CITY OF DALLAS, Etc., et al.,

Defendants-Appellees.

ORDER OF JUDGMENT

Defendants' motion to dismiss is DENIED and their motion for summary judgment is GRANTED, but DENIED as to subsections 41A-5(a)(8), 41A-5(c), part of 41A-5(a)(10) ("under indictment"), and 41A-5(a)(10)(A)(iii), (vi)-(ix). Plaintiffs' motions are GRANTED only to those subsections. The City is enjoined from enforcing the subsections, and they are severed (*id.* at section 41A-23[5]). Thus limited, the Ordinance is constitutional.

Signed this 12th day of September, 1986.

/S/ Jerry Buchmeyer

United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

CA3-86-1759-R

DUMAS, Etc., et al.,

Plaintiffs-Appellants,

versus

The CITY OF DALLAS, Etc., et al.,

Respondents-Appellees

Sept. 12, 1986

MEMORANDUM OPINION (Footnotes Omitted.)

BUCHMEYER, District Judge.

The law of zoning allows the will of a majority, expressed through a representative body, to control the evolution of a community and shape its character. The law of free speech, in contrast, prevents the majority will from suppressing minority expression that the majority finds intolerable. It is perhaps inevitable that the two values should clash, when a zoning ordinance attempts to limit the freedoms of those involved in expressing unpopular views. A body of first amendment/zoning jurisprudence has thus emerged, in an attempt to reconcile this potential for conflict. Because the zoning law under attack in this case -- the recently enacted "sexually oriented business" ordinance of the City of Dallas--follows the dictates of this recent hybrid body of law, it is constitutional, except for the four minor exceptions discussed below.

I. The Ordinance

On June 12, 1986, the Dallas city attorney presented a proposed ordinance regulating sexually oriented businesses to the Dallas City Plan Commission. The Commission considered studies carried out in other cities, but did not undertake a study of Dallas. *See* Defendant's Exhibit (DX) 6 (Austin), DX 7 (Indianapolis), and DX 11 (Los Angeles). The Commission did consider, however, a map of Dallas indicating areas in which sexually oriented businesses could locate under the proposed ordinance. *See* Transcript (DX 1) at 5, 30-33. The Commission also heard public testimony, both for and against the proposed ordinance. *See id.* at 11-51. The Commission voted unanimously to recommend adoption of an ordinance regulating sexually oriented businesses.

The Ordinance went before the Dallas City Council on June 18, 1986. The Council considered the three studies that were before the Commission, *see* Transcript (DX 17) at 3. The Council also considered a Dallas study comparing crime rates in two commercial sections, one with sexually oriented businesses and one without. *See id.* at 3 (finding crime rates 90 percent higher in adult district). After hearing public comment--unanimously in favor of the ordinance--the Council adopted it by unanimous vote. *See id.* at 28. Both representative bodies were in unanimous accord on the benefits of the ordinance.

Legislative intent. Divining the intent of a legislative body is inherently problematic, but the intent of both the Commission and the Council in adopting the Ordinance is transparently clear. Five of the 15 members of the Commission and four of the 11 members of the Council stated unequivocally--to no dissent--that the Ordinance was concerned solely with controlling the secondary effects of sexually oriented businesses on surrounding neighborhoods. Both groups stated that they were concerned not with the content of the speech associated with sexually oriented businesses, but with the crime, urban blight, and plummeting property values that inevitably seize the neighborhoods where such businesses locate. It is of no moment that the public speakers in favor of the Ordinance supported it almost singular-

ly in hopes that it would indeed suppress the speech purveyed by sexually oriented businesses, as neither the Council nor the Commission relied on the specious view that pornography "causes" various social ills and should thus be eliminated. The intent of the City in passing the Ordinance was solely to control the secondary effects of sexually oriented speech on the neighborhoods its purveyors inhabit, rather than to eliminate the speech itself.

The Council's findings. The Ordinance enacted by the City incorporated several findings. The City first found that it has authority to regulate businesses pursuant to its police power, and that licensing is a reasonable means to ensure that subject businesses comply with regulations. *See* Ordinance (DX 16) at 2. The Council then found that a substantial number of sexually oriented businesses require regulation to protect the "health, safety, and welfare" of the establishments' patrons and citizens in general. Public safety authorities should regulate such businesses, the Council reasoned, because the businesses "are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature" and because of the "concern over sexually transmitted disease." *Id.* The Council next found that arrests for sex-related crimes near sexually oriented businesses have been "substantial," and that there is "convincing documented evidence" that sexually oriented businesses are associated with falling property values of surrounding business and residential areas. Then, the Council found that when such businesses are located in close proximity to one another, "urban blight" and a decrease of the quality of life in adjacent areas results. Finally, the Council stated that its intent was to minimize these adverse effects, thus preserving property values in surrounding neighborhoods, deterring the spread of urban blight, and decreasing crime. *Id.* at 5. The Council emphasized, however, that it did not intend to limit access by adults to sexually oriented material protected by the first amendment. *Id.*

The Ordinance's terms. Based on these findings, the Council enacted an ordinance that pervasively regulates the operation of all sexually oriented businesses in Dallas. The most important changes made by the Ordinance, which is discussed in detail with the relevant arguments, are (1) strict locational prohibitions, including the requirement that a business be at least 1,000 feet from another sexually

oriented business, or a church, school, residential area, or park; (2) required licensing and inspection for all regulated businesses; (3) disqualification from licensure of any applicant who has been convicted of a specified crime, or whose spouse has been so convicted; (4) requirements that all patrons in an arcade -- even if within a closed booth -- be within the sight of a manager, and (5) various layout, furnishing, hiring, and lighting restrictions on regulated businesses.

II. The Plaintiffs

The plaintiffs in this case operate seven of the nine types of sexually oriented businesses classified in the Ordinance: (1) adult arcades; (2) adult bookstores or adult video stores; (3) adult cabarets; (4) adult motels; (5) adult motion picture theatres; (6) adult theatres; and (7) nude model studios. There are no escort agencies or sexual encounter centers that have appeared to challenge the Ordinance.

Under section 41A-13(f) of the Ordinance, each business is deemed a "nonconforming use" because of its location within 1000 feet of another sexually oriented business, or a church, school, residential district, or park. The plaintiffs may continue their business for a period of three years from June 18, 1986, unless "sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more." Plaintiffs are also prohibited from "increasing, extending, or altering" their businesses unless they are changed to a conforming use. At the conclusion of the three-year period under 41A-13(f), only the "first-established and continually operating" sexually oriented business at a particular location may continue to operate--so that the dispersal of sexually oriented businesses in Dallas will be completed by June 18, 1989.

The Ordinance would force many plaintiffs to relocate. Many are near specified-use areas; others are within 1000 feet of one another--as are plaintiffs Deja Vu, Texas Rose, Baby Dolls Saloon, Million Dollar Saloon II, Expose, and Bachman Cafe. The relocation provisions threaten the businesses with enormous expenditures; many have great investments in their locations and the value of their property--such as S.B. Sugars, Inc., which has obtained financing on a parking lot valued at $1,000,000. Other plaintiffs face economic hardship from the

Ordinance's restrictions on their activities. Adult motels, for example, will be restricted to renting rooms for at least ten hours, rather than the two-hour period common now--thus cutting their income by up to 80 percent.

The main attack in this case is, therefore, the location restriction and the three-year amortization period of section 41A-13(f). Plaintiffs also level attacks against each provision of the Ordinance that applies to them, claiming that the Ordinance's provisions are vague and overbroad, that its licensure requirement is unconstitutional, that it vests overbroad discretion in the Chief of Police, and that the Ordinance is not sufficiently related to the City's objectives.

III. Standing

[1] As a threshold issue, the City makes the argument--apparently one considered obligatory in cases such as this--that various defendants have no standing to challenge the Ordinance. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105, 103 S.Ct. 1660, 1666, 75 L.Ed.2d 675 (1983); *Brown v. Edwards*, 721 F.2d 1442, 1446-47 (5th Cir.1984). Moreover, the City claims that the plaintiffs' challenges are not ripe, because there is no "real and immediate threat" of closure of their businesses. Plaintiffs do not, however, present "abstract" questions of possible injuries. There is no doubt that the Ordinance, once effective, would pervasively change the manner in which each plaintiff runs his or her business; many would close. "It is clear that a party may challenge a licensing statute regardless of whether he or she was denied a permit, or whether one has ever been sought." *Fernandes v. Limmer*, 663 F.2d 619, 625 (5th Cir.1981); *see also Star Satellite, Inc., v. City of Biloxi*, 779 F.2d 1074, 1078 (5th Cir.1986); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969). The City's position amounts to a claim that plaintiffs' attacks could be asserted as a defense to an eventual state prosecution for defiance of the Ordinance. Such a forum would not, however, protect plaintiffs' rights. *See Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) (defense in state suit "will not assure adequate vindication of constitutional rights... a substantial loss of or impairment of freedoms of expression will occur if appellants must await the state court's disposition"); *Steffel v.*

Thompson, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Gibson v. Berryhill*, 411 U.S. 564, 577, 93 S.Ct. 1689, 1697, 36 L.Ed.2d 488 (1973); *Gerstein v. Pugh*, 420 U.S. 103, 108 n. 9, 95 S.Ct 854, 860 n. 9, 43 L.Ed.2d 54 (1975). No state prosecution is underway, and the complete determination of plaintiffs' claims here will aid and expediate the City's efforts, rather than delaying and hindering them. *Cf. Huffman v. Pursue Ltd.*, 420 U.S. 592, 604-05, 95 S.Ct. 1200, 1208, 43 L.Ed.2d 482 (1975); *Trainor v. Hernandez*, 431 U.S. 434, 446 & n. 8, 97 S.Ct. 1911, 1919 & n. 8, 52 L.Ed.2d 486 (1977). Under the factual allegations presented, plaintiffs do have standing to challenge the Ordinance and their challenge is ripe for determination.

IV. Constitutionality

[2,3] Regardless of the Ordinance's focus on the secondary effects of sexually oriented businesses, there is no doubt that its terms have an incidental impact on expression that is protected by the first amendment. Because of this impact, it is appropriate to analyze the statute under the four-part test of *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672 (1968). *See City of Renton v. Playtime Theatres, Inc.*, — U.S. —, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986); *Young v. American Mini Theatres*, 427 U.S. 50, 79, 96 S.Ct. 2440, 2456, 49 L.Ed.2d 310 (1976) (Powell, J., concurring). Under the *O'Brien* test, regulation is justified despite its impact on first amendment interests "[1] if it is within the constitutional power of the government; [2] if it furthers an important or substantial governmental interest; [3] if the governmental interest is unrelated to the suppression of free expression; and [4] if the incidental restriction on ... first amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679. Incidental burdens on free expression may be analyzed under this test as time, place, and manner regulations. *Renton*, 106, S.Ct. at 927. The first three elements may be considered without reference to the specific requirements of the Ordinance; a determination of whether the Ordinance's particular terms follow the least restrictive means available must, however, be made independently for each of the Ordinance's restrictions.

First, it is without doubt that the police power of the City encom-

passes the power to enact a zoning and a regulatory ordinance such as that considered here. *See ante* at 1063 n. 1; *see also Renton*, 106 S.Ct. at 927 (similar ordinance within police power). Second, the interests the City studied and intended to further by the Ordinance--crime control, protection of property values, and prevention of urban blight, *see ante* at 1064 & nn.8-9--are both important and substantial. *See Young*, 427 U.S. at 79, 96 S.Ct. at 2456 (Powell, J., concurring). Third, the intent of the City--garnered from complete reports of both the Plan Commission and City Council proceedings--demonstrates that the governmental interest was unrelated to the suppression of free expression. *See ante* at 1064-65 nn. 8-10. The legislative response to the secondary effects of sexually oriented businesses evinced a clear intent to leave alternative avenues open for expression of that genre, while lessening the effects of such businesses on the surrounding community. The first three elements of the *O'Brien* test are satisfied; evaluation of the fourth factor requires reference to each challenged section of the Ordinance.

[4] *Locational restrictions.* The element of the Ordinance that is most vigorously challenged is the one element that is least susceptible to challenge after *Young* and *Renton*. Section 41A-13 states that a sexually oriented business cannot be located within 1000 feet of (1) a church; (2) a public or private elementary or secondary school; (3) a boundary of a residential district; (4) a public park adjacent to a residential district; (5) the property line of a lot devoted to a residential use; or (6) another sexually oriented business. If a regulated business is currently in violation of the section, it is deemed a nonconforming use and allowed to continue to operate for three years. A properly located regulated business is not rendered a nonconforming use by the subsequent location of a church, school, park, or residential area within 1000 feet of the business.

No doubt remains after *Renton* and *Young* that dispersed zoning of sexually oriented businesses is permissible, provided that "reasonable alternative avenues of communication" exist. *See Renton*, 106 S.Ct. at 928; *See also Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 75-6, 101 S.Ct. 2176, 2186, 68 L.Ed.2d 671 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 116, 92 S.Ct. 2294, 2303, 33 L.Ed.2d 222 (1972). In *Young*, a Detroit zoning plan similar to that challenged here

was approved, but "[t]he situation would have been quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* 427 U.S. at 71 n. 35, 96 S.Ct. at 2453 n. 35; *accord, Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir.1982)(only "oppressive options remained to an aspiring promoter of adult films"); *Olmos Realty Co. v. State*, 693 S.W.2d 711,714 (Tex.Civ.App.--San Antonio, no writ); *Keego Harbor Co. v. Keego Harbor*, 657 F.2d 94 (6th Cir.1981)(ordinance prohibited all theatres); *Alexander v. City of Minneapolis*, 698 F.2d 936, 937-38 (8th Cir.1983) (ordinance led to closing all theatres); *Purple Onion, Inc., v. Jacksonville*, 511 F.Supp 1207, 1217 (N.D.Ga.1981)(sites either "unavailable, unusable, or so inaccessible to the public [that] they amount to no locations"); *Renton*, 106 S.Ct. at 938, 54 U.S.L.W. at 4167 (Brennan, J., dissenting)(must have "reasonable opportunity to operate"). The majority opinion in *Renton*, however, has made it clear that there need be only a "reasonable opportunity to locate within the city; the Court expressly rejected findings of fact that the 520 acres left open by the ordinance was not truly "available" for regulated use.

The land available for sexually oriented businesses under the Dallas ordinance is substantial, and satisfies *Basiardanes* and *Renton*. The maps considered by the City upon enacting the Ordinance detail several areas that are open to sexually oriented businesses, and it cannot be said that a "reasonable" opportunity for such businesses does not exist under the Ordinance. The plan adopted by Dallas differs markedly form the Galveston plan rejected in *Basiardanes*, 682, F.2d at 1214; that plan incorporated an outright ban on 85-90 percent of the city's total area, and the remaining areas, located "among warehouses, shipyards, undeveloped areas, and swamps," were reached by "few access roads." *Id.* The Dallas plan, in contrast, permits location in several areas stretching from the inner city area to the north and south suburbs, accessed by such major throughfares as Interstate 35, Interstate 30, Loop 12, Highway 183, and Harry Hines Boulevard. Eight to ten percent of the city's total area--21,000 acres--is available. *Cf. Renton*, 106 S.Ct. at 930 (5 percent). See DX 15; PX 1; DX 27. There is no impediment to the locational restrictions enacted in the Ordinance.

[5] The three-year amortization clause is also challenged. Such clauses, however, are uniformly upheld. *See Hart Bookstores v. Edmisten*, 612 F.2d 821, 830 (4th Cir.1979), *cert. denied*, 447 U.S. 929,

100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980)(upholding six-month amortization period); *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585, P.2d 1153, 1160 (1978), *cert. denied sub nom. Apple Theater v. Seattle*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979)(upholding three-month amortization period); *see also* Note, *Using Constitutional Zoning to Neutralize Adult Entertainment--Detroit to New York*, 5 *Fordham Urban L.J.* 455, 472-74 (1977)(advocating one-year amortization period); *SDJ, Inc. v. City of Houston*, 636 F.Supp. 1359, 1371 (S.D. Tex.1986) (six-month period). *See generally Lubbock Poster Co. v. City of Lubbock*, 569 S.W.2d 935, 940-43 (Tex.Civ.App.--Amarillo, writ ref'd n.r.e.). The period allowed by the Ordinance is more generous than others that have been upheld; it is a valid mechanism used to enforce valid locational regulations.

Licensure requirement. Although there is no constitutional impediment to the concept of requiring sexually oriented businesses to obtain licenses and pay reasonable fees, plaintiffs challenge the manner in which the licensing scheme is implemented and the qualifications the scheme imposes upon licensees. The challenge is sustained only as to subsections 41A-5(a)(8), 41A-5(a)(10)(B)(c), part of 41A-5(a)(10) and 41A-5(10)(A)(iii) and (vi)-(ix); the City will be enjoined from enforcing those sections, which may be easily severed from the remainder of the Ordinance.

[6] It is settled constitutional principle that any license requirement for an activity related to expression must contain narrow, objective, and definite standards to guide the licensing authority. *See Shuttlesworth v. Birmingham*, 394 U.S. 147, 150-51, 89 S.Ct. 935, 938, 22 L.Ed.2d 162 (1969); *Saia v. New York*, 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948). The City argues that the Ordinance vests no discretion in the Chief of Police, as it states that he "shall" approve the issuance of a license "unless" a factual basis for denial exists. This assertion is largely correct, but it is a simplistic view of the actual operation of two subsections of the Ordinance. First, section 41A-5(a)(8) allows the police chief to deny a license to an applicant who has been employed in a sexually oriented business on a finding that "he is *unable* to operate or manage a sexually oriented business premises in a *peaceful* and law-abiding *manner*" (emphasis added). Second, the Ordinance allows an applicant with a past conviction to

be granted a license if the sufficient amount of time has elapsed, but section 41A-5(c) allows the police chief to grant a license to such an applicant "only if the chief of police determines that the applicant or applicant's spouse is *presently fit* to operate a sexually oriented business" (emphasis added). Neither section provides sufficiently definite standards to pass constitutional muster.

Both sections ask the police chief to make subjective judgments on the fitness of an applicant; neither, then, is controlled by standards "susceptible of objective measurement." *Keyishian v. Board of Regents*, 385 U.S. 589, 603-04, 87 S.Ct. 675, 683-84, 17 L.Ed.2d 629 (1967). The Ordinance is more specific in addressing the "present fitness" of an applicant with a past conviction; in at least one case, however, the specificity itself constitutes overbroad discretion--one factor the police chief is to take into account is "the amount of time that has elapsed since his last criminal activity." *See* subsection 41A-5(c)(3). Under this subsection, then, the police chief is permitted to extend indefinitely the periods specifically enumerated by the Ordinance in subsection 41A-5(a)(10)(B)(i-iii). By reference to the "extent and nature" of the applicant's past criminal activity, *id.* at 41A-5(c)(1), the applicant's age at the time of the offense, *id.* at 41A-5(c)(2), the applicant's "conduct and work activity," *id.* at 41A-5(c)(4), evidence of the applicant's "rehabilitation," *id.* at 41A-5(c)(5), and letters "from prosecution, law enforcement, and correctional officers," *id.* at 41A-5(c)(6), then, the police chief may determine that an applicant will not be granted a license. These two subsections vest unfettered discretion in the police chief, and cannot survive constitutional scrutiny.

Shorn of the two sections that vest subjective and unguided authority in the police chief, however, the largest part of the licensure section is constitutional. The findings the police chief must make in licensing sexually oriented businesses are based on objectively determinable facts, and are thus permissible. *See Memet v. State*, 642 S.W.2d 518, 524 (Tex.Civ.App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Schope v. State*, 647 S.W.2d 675, 680 (Tex.Civ.App.--Houston [14th Dist.] 1982, writ ref'd n.r.e.). Age restrictions are factually based, see subsection 41A-5(a)(1), as are determinations of past due fees and taxes, *see id.* at 41A-5(a)(2), and false statements on application forms,

see id. at 41A-5(a)(3), *see Schope*, 647 S.W.2d at 680 (upholding ordinance including such factors); *Bayside Enterprises v. Carson*, 470 F. Supp. 1140, 1148, (M.D.Fla.1979)(upholding unpaid tax or fee provision); *Genusa*, 619 F.2d at 1219-20 (upholding provision for false statements). Failure to comply with the Ordinance, subsections 41A-5(a)(4) and (9), may be objectively verified, as may approval of premises by health, fire, and building officials, subsection 41A-5(a)(6). *See SDJ, Inc. v. City of Houston*, 636 F.Supp. at 1368-69 (S.D.Tex.1986). Whether an applicant resides with someone who has been recently denied a license or whose license has been revoked, subsection 41A-5(1)(5), may be objectively verified. Finally, although this Court agrees that "persons with prior criminal records are not first amendment outcasts," *Fernandes v. Limmer*, 663 F.2d 619, 630 (5th Cir.1981), *cert. dismissed*, 458 U.S. 1124, 103 S.Ct. 5, 73 L.Ed.2d 1395 (1982), denial of licensure to those convicted of certain specified crimes that are related to the crime-control intent of the law is undoubtedly permitted.

[7] Five enumerated crimes, however, are not sufficiently related to the purpose of the Ordinance to withstand scrutiny. Although thirteen of the offenses are clearly related to the purpose of the Ordinance as it was debated by the City, no findings exist to justify prohibiting one convicted of (1)a controlled substances act violation, (2)bribery, (3)robbery, (4)kidnapping, or (5)organized criminal activity from obtaining a license to operate a sexually oriented business. In the absence of such findings, this Court cannot say that the offenses enumerated are sufficiently related to the purpose of the Ordinance--either for constitutional purposes, or for purposes of the City's authority under Texas law. *See Young*, 427 U.S. 50, 56 n. 11, 96 S.Ct. 2440, 2445 n. 11; *see also Tex.Civ.Stat.Ann.* art. 6252-13c (supp.1986) (denial of license proper only if crime "directly relates to an occupation."). Subsections 41A-5(a)(10)(A)(iii), (vi) (vii), and (ix) are thus constitutionally and statutorily invalid.

[8] The language of subsection 41A-5(a)(10) that compels the police chief to deny licensure to an applicant "under indictment or misdemeanor information" for a specified crime must also fail. Although the City undoubtedly has a legitimate interest in preventing one convicted of a specified crime from holding a license, *see ante* at 1073

and n. 34, denial on the basis of mere indictment or information cannot pass constitutional scrutiny. An indictment or information is not evidence of an applicant's guilt, but merely indicates that an *ex parte* procedure navigated solely by a prosecutor has resulted in a finding of probable cause. *See United States v. Calandra*, 414 U.S. 338, 344-45, 94 S.Ct. 613, 618 38 L.Ed.2d 561 (1974). The simple act of indictment or information cannot carry the heavy burden implicit in suppressing speech that is protected by the first amendment, and may implicate overbreadth in chilling protected speech. Dispositively, however, the prohibition against licensure of one under indictment or information fails the fourth *O'Brien* test in that less restrictive means of accomplishing the legislative goal exist. If the City intends to forestall revocation procedures against one who is eventually convicted of a specified crime by denying a license to an applicant under indictment, it may easily accomplish this purpose by amending to defer decision *for a limited period of time* on an application to see if an adjudication of guilt has been made during this period--requiring denial and subsequent reapplication is both inefficient, *see* Posner, *Economic Analysis of the Law, passim* (1972) (duplicative expending of administrative and legal resources), and constitutionally infirm.

Plaintiffs also attack various procedural aspects of the licensure system, including the appeal process, under *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Primary to their contention is their claim that "*no* judicial review is provided for." This assertion, however, is entirely meritless. Although no provision for judicial review is made, "none is needed. One denied a permit may seek a hearing, appeal that hearing, and then turn to courts of law." *Memet*, 642 S.W.2d at 524; *see also Dixon v. Love*, 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 (1977); *Harper v. Lindsay*, 616 F.2d 849, 858 (5th Cir.1980). The appeal, revocation, and suspension provisions are replete with procedural protections and reviewable standards, and comport with *Freedman* and fundamental tenets of due process.

Definitions. Vagueness challenges are imposed against the various definitions and terms utilized in the Ordinance. All terms used, however, are designed to "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute,"

Papachristou v. City of Jacksonville, 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1971), in light of common understanding and practices. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1971). Indeed, the language of many provisions has been taken from ordinances upheld by the Supreme Court, see *Young*, 427 U.S. at 53, 96 S.Ct. at 2244 ("specified sexual activities" and "specific sexual anatomical areas"); *City of Renton*, 106 S.Ct. at 927 ("primary purpose"). Other elements of the Ordinance have been upheld by the courts. *See Hart Bookstores v. Edmisten*, 612 F.2d 821, 833 (4th Cir.1979), *cert. denied*, 447 U.S. 929, 100 S.Ct. 3028, 65 L.Ed.2d 1124 (1980) ("distinguished or characterized by"; *Miller v. California*, 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) ("depicting or describing"); *Hart Bookstores*, 612 F.2d at 834 ("adult bookstore"); *Stansberry v. Holmes*, 613 F.2d 1285, 1290 (5th Cir. 1980) ("major business," similar to "principal business purpose" used in Ordinance); *Basiardanes v. City of Galveston*, 682 F.2d 1203,1210 (5th Cir. 1982) ("regularly" features); *Northend Cinema, Inc. v. Seattle*, 90 Wash.2d 709, 585 P.2d 1153 (1978), *cert. denied sub nom. Apple Theatre v. Seattle*, 441 U.S. 946, 99 S.Ct. 2166, 60 L.Ed.2d 1048 (1979) ("adult theatre"); *15192 Thirteen Mile Road, Inc. v. City of Warren*, 626 F.Supp. 803, 808 (E.D.Mich.1985) ("escort agency"); *SDJ, Inc. V. City of Houston*, 636 F.Supp. at 1364 (topless bars). There is no constitutional impediment to the phraseology of the Ordinance.

Internal restrictions. The Ordinance requires various internal restrictions of regulated businesses--from major renovations in the design of adult arcades to the allowance of sofas in nude modeling studios. While such intrusions into the internal design of regulated businesses may seem unduly restrictive, they have consistently been upheld. *See Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir.1986) (requiring closed viewing booths to be within view of management "falls within the broad general limits of the police power" and satisfies *O'Brien*); *Ellwest Stereo Theatres v. Wenner*, 681 F.2d 1243, 1246 (9th Cir.1982) (same); *EWAP, Inc. v. City of Los Angeles*, 97 Cal.App.3d 179, 158 Cal.Rptr. 579 (1979) (same); *Purple Onion, Inc. v. Jackson*, 511 F.Supp. 1207, 1227 (N.D.Ga. 1981) (nude modeling studios may be pervasively regulated, as they contain no element of "expression"); *Upper Midwest Book-*

sellers v. City of Minneapolis, 780 F.2d 1389 (8th Cir.1985) (display to minors); *Pollard v. Cockrell*, 578 F.2d 1002, 1013 (5th Cir.1978) (permissible to distinguish between "legitimate" and regulated use of nude models). The City did indeed make sufficient findings to justify restrictions on adult motels, *see ante* at 4 n. 9 (statement of Ms. Ragsdale), *cf. Patel & Patel v. South San Francisco*, 606 F.Supp. 666, 671 (N.D.Cal.1985) (no findings); moreover, recent pronouncements of state power to regulate morality and private consensual sexual activity are probably broad enough to encompass regulation on adult motels. *See Bowers v. Hardwick*, —U.S.—, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) (no privacy right to consensual homosexual, and, arguably, heterosexual sodomy); *Baker v. Wade*, 769 F.2d 289 (5th Cir.1985) *(en banc), cert. denied*, —U.S.—, 106 S.Ct. 3338, 92 L.Ed.2d 742 (1986). As the City has made the requisite findings, the various restrictions on the operation, layout, design, and furnishing of regulated businesses must be upheld. *See Young*, 427 U.S. at 56 nn. 11-12, 96 S.Ct. at 2445 nn. 11-12.

Summary. Only the four subsections described above--41A-5(a)(8), 41A-5(c), the "under indictment or information" language of 41-A5(a)(10), and the five unrelated crimes of 41A-5(a)(10)--fail to satisfy the fourth prong of the *O'Brien* test. The ordinance is thus constitutional, with the above minor exceptions--which are severable, see section 41A-23(5), and may be cured by amendment.

V. Conclusion

Efforts to restrict the accessability of sexually oriented speech have long been part of Western legal tradition, as has the principle that expression should be free and unfettered. The reconciliation of the competing values implicit in these two longstanding concepts inevitably shifts over time, in response to technological change and evolving conceptions of the legality of legislating majoritarian conceptions of morality. Restrictions in the place and manner of sexually oriented expression through zoning regulation is the most recent jurisprudential attempt to allow majority community structure to coexist with minority expression; the sexually oriented business ordinance enacted by the City follows the substantive dictates of this body of law, and must be upheld.

APPENDIX C

DALLAS CITY COUNCIL MEETING
June 18, 1986

Excerpt from Testimony Concerning Proposed Dallas City Ordinance Regulating Sexually Oriented Businesses. (DX 17)

(page 23)

MS. RAGSDALE: Well, I want to say a few words at this time. I think it's absolutely necessary for the passage of this ordinance for several reasons, not only because of the -- the moral question, but also we all have a civic responsibility to those who we are (page 24) supposed to serve.

This ordinance, particularly with respect to the motels and the proliferation of motels in the southern sector and which are in close proximity to churches, residences, as well as schools, continue to not only increase the crime but also just the neighborhood is becoming viciously angry at the presence and the ongoing presence of these given -- of these given facilities within the area.

I should hope that, not only should we pass it but we should be -- take this issue very seriously and also move to other measures to address the whole issue of motels in the southern sector with respect to heavy zoning which even allows these types of things to be located so close to residential areas.

In some areas these motels would have never been established in the first place, but because we have this overwhelming zoning which allows anything to be located there, we find motels literally across the street from houses, literally, certainly much less than a thousand feet.

Although I am not completely satisfied, but I must admit that I am glad that we have taken this step. It will do the following for those who have come to speak regarding the motels, and most of those individuals (page 25) who did come down regarding Cedar – regarding the motel on Mouser and Cedar Crest happened to be in the district that I represent. It will do the following: Number one, motels – motel rooms should not lease or rent for less than twelve hours. Number two, if motels are in close proximity, meaning a thousaand feet within a residence or within church, within school, then over a three-year period these motels should be phased out. If they are caught – during the interim, if they are caught violating the law, of course, then their license can be revoked.

I know I talked to some earlier, and of course this was not to their complete satisfaction, but I must admit I think we've taken a very strong, progressive step.

APPENDIX D

CITY OF DALLAS ORDINANCE NO. 19136
Enacted June 18, 1986

An ordinance amending the Dallas City Code, as amended, by adding CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES" to be comprised of Sections 41A-1 through 41A-23; repealing Sections 31-24 and 31-26 of the Dallas City Code; providing definitions; providing for licensing and regulation of sexually oriented businesses; regulating the location of sexually oriented businesses; providing for enforcement; providing a penalty not to exceed $1000 for certain offenses, and designating certain other offenses as class B misdemeanors; providing a severability clause; and providing an effective date.

WHEREAS, the city council makes the following findings with regard to sexually oriented establishments:

(1) Article 1175, Section 23, of the Revised Civil Statutes of Texas authorizes home rule cities to license any lawful business, occcupation, or calling that is susceptible to the control of the police power.

(2) Article 1175, Section 34, of the Revised Civil Statutes of Texas authorizes home rule cities to enforce all ordinances necessary to protect health, life, and property, and to preserve the good government, order and security of such cities and their inhabitants.

(3) There are a substantial number of sexually oriented businesses

in the city that require special supervision from the public safety agencies of the city in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the city.

(4) The city council finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature.

(5) The city council further finds that the city police have made a substantial number of arrests for sexually related crimes in sexually oriented business establishments.

(6) The concern over sexually transmitted diseases is a legitimate health concern of the city which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens.

(7) Licensing is a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation.

(8) There is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas adjacent to them, causing increased crime and the downgrading of property values.

(9) It is recognized that sexually oriented businesses, due to their nature have serious objectionable operational characteristics particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent areas.

(10) The city council desires to minimize and control these adverse effects and thereby preserve the property values and character of surrounding neighborhoods, deter the spread of urban blight, protect the citizens from increased crime, preserve the quality of life, and protect the health, safety, and welfare of the citizenry; and

WHEREAS, the city council makes the following findings with regard to the licensing of sexually oriented business establishments:

(1) The city council believes it is in the interest of the public safety and welfare to prohibit persons convicted of certain crimes from engaging in the occupation of operating a sexually oriented business.

(2) The city council, in accordance with Article 6252-13c of Vernon's Texas Civil Statutes, has considered the following criteria:

(a) the nature and seriousness of the crimes;

(b) the relationship of the crimes to the purposes for requiring a license to engage in the occupation;

(c) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(d) the relationship of the crimes to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation; and has determined that the crimes listed in Sections 41A-5(a)(10) of CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES," of the Dallas City Code, as set forth in this ordinance, are serious crimes which are directly related to the duties and responsibilities of the occupation of operating a sexually oriented business. The city council has further determined that the very nature of the occupation of operating a sexually oriented business brings a person into constant contact with persons interested in sexually oriented materials and activities thereby giving the person repeated opportunities to commit offenses against public order and decency or crimes against the public health, safety, or morals should he be so inclined. Thus, it is the opinion for the city council that the listed crimes render a person unable, incompetent, and unfit to perform the duties and responsibilities accompanying the operation of a sexually oriented business in a manner that would promote the public safety and trust.

(3) The city council has determined that no person who has been convicted of a crime listed in Section 41A-5(a)(10), as set forth in this ordinance, is presently fit to operate a sexually oriented business until the respective time periods designated in that section have expired.

(4) It is the intent of the city council to disqualify a person from being issued a sexually oriented business license by the city of Dallas

if he is currently under indictment or misdemeanor information for, or has been convicted within the designated time period of, any of the crimes listed in Section 41A-5(a)(10), as set forth in this ordinance; NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF DALLAS:

SECTION 1. That the Dallas City Code, as amended, is amended by adding Chapter 41A, "SEXUALLY ORIENTED BUSINESSES," to read as follows:

CHAPTER 41A, "SEXUALLY ORIENTED BUSINESSES"

SEC. 41A-1. PURPOSE AND INTENT.

(a) It is the purpose of this chapter to regulate sexually oriented businesses to promote the health, safety, morals, and general welfare of the citizens of the city, and to establish reasonable and uniform regulations to prevent the continued concentration of sexually oriented businesses within the city. The provisions of this chapter have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly, it is not the intent nor effect of this chapter to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access to distributors and exhibitors of sexually oriented entertainment to their intended market.

(b) It is the intent of the city council that the locational regulations of Section 41A-13 of this chapter are promulgated pursuant to Article 2372w, Revised Civil Statutes of Texas, as they apply to nude model studios and sexual encounter centers only. It is the intent of the city council that all other provisions of this chapter are promulgated pursuant to the Dallas City Charter and Article 1175, Revised Civil Statutes of Texas.

SEC. 41A-2. DEFINITIONS.

In this chapter:

(1) ADULT ARCADE means any place to which the public is

permitted or invited wherein coin-operated or slug-operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image-producing devices are maintained to show images to five or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of "specified sexual activities" or "specified anatomical areas."

(2) ADULT BOOKSTORE or ADULT VIDEO STORE means a commercial establishment which as one of its principal business purposes offers for sale or rental for any form of consideration any one or more of the following:

(A) books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes or video reproductions, slides, or other visual representations which depict or describe "specified sexual activities" or "specified anatomical areas"; or

(B) instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) ADULT CABARET means a nightclub, bar, restaurant, or similar commercial establishment which regularly features:

(A) persons who appear in a state of nudity; or

(B) live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities"; or

(C) films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(4) ADULT MOTEL means a hotel, motel, or similar commercial establishment which:

(A) offers accommodations to the public for any form of consideration; provides patrons with closed-circuit television transmissions, films, motion pictures, video cassettes, slides, or other photographic reproductions which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas"; and has a sign visible from the public right of way which ad-

vertises the availability of this adult type of photographic reproductions; or

(B) offers a sleeping room for rent for a period of time that is less than 10 hours; or

(C) allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than 10 hours.

(5) ADULT MOTION PICTURE THEATER means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of "specified sexual activities" or "specified anatomical areas."

(6) ADULT THEATER means a theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear in a state of nudity or live performances which are characterized by the exposure of "specified anatomical areas" or by "specified sexual activities."

(7) CHIEF OF POLICE means the chief of police of the city of Dallas or his designated agent.

(8) ESCORT means a person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately perform a striptease for another person.

(9) ESCORT AGENCY means a person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes, for a fee, tip, or other consideration.

(10) ESTABLISHMENT means and includes any of the following:

(A) the opening or commencement of any sexually oriented business as a new business;

(B) the conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;

(C) the addition of any sexually oriented business to any other existing sexually oriented business; or

(D) the relocation of any sexually oriented business.

(11) LICENSEE means a person in whose name a license to operate a sexually oriented business has been issued, as well as the individual listed as an applicant on the application for a license.

(12) NUDE MODEL STUDIO means any place where a person who appears in a state of nudity or displays "specified anatomical areas" is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

(13) NUDITY or a STATE OF NUDITY means the appearance of a human bare buttock, anus, male genitals, female genitals, or female breast.

(14) PERSON means an individual, proprietorship, partnership, corporation, association, or other legal entity.

(15)SEMI-NUDE means a state of dress in which clothing covers no more than the genitals, pubic region, and areolae of the female breast, as well as portions of the body covered by supporting straps or devices.

(16) SEXUAL ENCOUNTER CENTER means a business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

(A) physical contact in the form of wrestling or tumbling between persons of the opposite sex; or

(B) activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi-nude.

(17) SEXUALLY ORIENTED BUSINESS means an adult arcade, adult bookstore or adult video store, adult cabaret, adult motel, adult motion picture theater, adult theater, escort agency, nude model studio, or sexual encounter center.

(18) SPECIFIED ANATOMICAL AREAS means human genitals in a state of sexual arousal.

(19) SPECIFIED SEXUAL ACTIVITIES means and included any of the following:

(A) the fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;

(B) sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;

(C) masturbation, actual or simulated; or

(D) excretory functions as part of or in connection with any of the activities set forth in (A) through (C) above.

(20) SUBSTANTIAL ENLARGEMENT of a sexually oriented business means the increase in floor area occupied by the business by more than 25 percent, as the floor area exists on June 18, 1986.

(21) TRANSFER OF OWNERSHIP OR CONTROL of a sexually oriented business means and includes any of the following:

(A) the sale, lease, or sublease of the business;

(B) the transfer of securities which constitute a controlling interest in the business, whether by sale, exchange, or similar means; or

(C) the establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

SEC. 41A-3. CLASSIFICATION.

Sexually oriented businesses are classified as follows:

(1) adult arcades;

(2) adult bookstores or adult video stores;

(3) adult cabarets;

(4) adult motels;

(5) adult motion picture theaters;

(6) adult theaters;

(7) escort agencies;

(8) nude model studios; and

(9) sexual encounter centers.

SEC 41A-4. LICENSE REQUIRED.

(a) A person commits an offense if he operates a sexually oriented business without a valid license, issued by the city for the particular type of business.

(b) An application for a license must be made on a form provided by the chief of police. The application must be accompanied by a sketch or diagram showing the configuration of the premises, including a statement of total floor space occupied by the business. The sketch or diagram need not be professionally prepared but must be drawn to a designated scale or drawn with marked dimensions of the interior of the premises to an accuracy of plus or minus six inches. Applicants who must comply with Section 41A-19 of this chapter shall submit a diagram meeting the requirements of Section 41A-19.

(c) The applicant must be qualified according to the provisions of this chapter and the premises must be inspected and found to be in compliance with the law by the health department, fire department, and building official.

(d) If a person who wishes to operate a sexually oriented business is an individual, he must sign the application for a license as applicant. If a person who wishes to operate a sexually oriented business is other than an individual, each individual who has a 20 percent or greater interest in the business must sign the application for a license as applicant. Each applicant must be qualified under Section 41A-5 and each applicant shall be considered a licensee if a license is granted.

(e) The fact that a person possesses a valid theater license, dance hall license, or public house of amusement license does not exempt him from the requirement of obtaining a sexually oriented business license. A person who operates a sexually oriented business and possesses a theater license, public house of amusement license or dance hall license shall comply with the requirements and provisions of this chapter as well as the requirements and provisions of Chapter 46 and Chapter 14 of this code when applicable.

SEC. 41A-5. ISSUANCE OF LICENSE.

(a) The chief of police shall approve the issuance of a license by the assessor and collector of taxes to an applicant within 30 days after receipt of an application unless he finds one or more of the following to be true:

(1) An applicant is under 18 years of age.

(2) An applicant or an applicant's spouse is overdue in his pay-

ment to the city of taxes, fees, fines, or penalties assessed against him or imposed upon him in relation to a sexually oriented business.

(3) An applicant has failed to provide information reasonably necessary for issuance of the license or has falsely answered a question or request for information on the application form.

(4) An applicant or an applicant's spouse has been convicted of a violation of a provision of this chapter, other than the offense of operating a sexually oriented business without a license, within two years immediately preceding the application. The fact that a conviction is being appealed shall have no effect.

(5) An applicant is residing with a person who has been denied a license by the city to operate a sexually oriented business within the preceding 12 months, or residing with a person whose license to operate a sexually oriented business has been revoked within the preceding 12 months.

(6) The premises to be used for the sexually oriented business have not been approved by the health department, fire department, and the building official as being in compliance with applicable laws and ordinances.

(7) The license fee required by this chapter has not been paid.

(8) An applicant has been employed in a sexually oriented business in a managerial capacity within the preceding 12 months and has demonstrated that he is unable to operate or manage a sexually oriented business premises in a peaceful and law-abiding manner.

(9) An applicant or the proposed establishment is in violation of or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19 or 41A-20.

(10) An applicant or an applicant's spouse has been convicted of or is under indictment or misdemeanor information for a crime:

(A) involving:

(i) any of the following offenses as described in Chapter 43 of the Texas Penal Code:

(aa) prostitution;

(bb) promotion of prostitution;

(cc) aggravated promotion of prostitution;

(dd) compelling prostitution;

(ee) obscenity;

(ff) sale, distribution, or display of harmful material to minor;

(gg) sexual performance by a child;

(hh) possession of child pornography;

(ii) any of the following offenses as described in Chapter 21 of the Texas Penal Code.

(aa) public lewdness;

(bb) indecent exposure;

(cc) indecency with a child;

(iii) engaging in organized criminal activity as described in Chapter 71 of the Texas Penal Code;

(iv) sexual assault or aggravated sexual assault as described in Chapter 22 of the Texas Penal Code;

(v) incest, solicitation of a child, or harboring a runaway child as described in Chapter 25 of the Texas Penal Code;

(vi) kidnapping or aggravated kidnapping as described in Chapter 20 of the Texas Penal Code;

(vii) robbery or aggravated robbery as described in Chapter 29 of the Texas Penal Code;

(viii) bribery or retaliation as described in Chapter 36 of the Texas Penal Code;

(ix) a violation of the Texas Controlled Substances Act or Dangerous Drugs Act punishable as a felony, Class A misdemeanor, or Class B misdemeanor; or

(x) criminal attempt, conspiracy, or solicitation to commit any of the foregoing offenses;

(B) for which:

(i) less than two years have elapsed since the date of conviction or the date of release from confinement imposed for the con-

viction, whichever is the later date, if the conviction is of misdemeanor offense;

(ii) less than five years have elapsed since the date of conviction or the date of release from confinement for the conviction, whichever is the later date, if the conviction is of a felony offense; or

(iii) less than five years have elapsed since the date of the last conviction or the date of release from confinement for the last conviction, whichever is the later date, if the convictions are of two or more misdemanor offenses or combination of misdemeanor offenses occurring within any 24-month period.

(b) The fact that a conviction is being appealed shall have no effect on the disqualification of the applicant or applicant's spouse.

(c) An applicant who has been convicted or whose spouse has been convicted of an offense listed in Subsection (a)(10), for which the required time period has elapsed since the date of conviction or the date of release from confinement imposed for the conviction, may qualify for a sexually oriented business license only if the chief of police determines that the applicant or applicant's spouse is presently fit to operate a sexually oriented business. In determining present fitness under this section, the chief of police shall consider the following factors concerning the applicant or applicant's spouse, whichever had the criminal conviction:

(1) the extent and nature of his past criminal activity;

(2) his age at the time of the commission of the crime;

(3) the amount of time that has elapsed since his last criminal activity;

(4) his conduct and work activity prior to and following the criminal activity;

(5) evidence of his rehabilitation or rehabilitative effort while incarcerated or following release; and

(6) other evidence of his present fitness, including letters of recommendation from prosecution, law enforcement, and correctional officers who prosecuted, arrested, or had custodial responsibility for him; the sheriff and chief of police in the community where he resides; and any other persons in contact with him.

(d) It is the responsibility of the applicant, to the extent possible, to secure and provide to the chief of police the evidence required to determine present fitness under Subsection (c) of this section.

(e) The license, if granted, shall state on its face the name of the person or persons to whom it is granted, the expiration date, and the address of the sexually oriented business. The license shall be posted in a conspicuous place at or near the entrance to the sexually oriented business so that it may be easily read at any time.

SEC. 41A-6. FEES.

(a) The annual fee for a sexually oriented business license is $500.

(b) If an applicant is required by this code to also obtain a dance hall license or public house of amusement license for the business at a single location, payment of the fee for the sexually oriented business license exempts the applicant from payment of the fees for the dance hall or public house of amusement licenses.

SEC. 41A-7. INSPECTION.

(a) An applicant or licensee shall permit representatives of the police department, health department, fire department, housing and neighborhood services department, and building inspection division to inspect the premises of a sexually oriented business for the purpose of insuring compliance with the law, at any time it is occupied or open for business.

(b) A person who operates a sexually oriented business for his agent or employee commits an offense if he refuses to permit a lawful inspection of the premises by a representative of the police department at any time it is occupied or open for business.

SEC. 41A-8. EXPIRATION OF LICENSE.

(a) Each license shall expire one year from the date of issuance and may be renewed only by making application as provided in Section 41A-4. Application for renewal should be made at least 30 days before the expiration date, and when made less than 30 days before the expiration date, the expiration of the license will not be affected.

(b) When the chief of police denies renewal of a license, the ap-

plicant shall not be issued a license for one year from the date of denial. If, subsequent to denial, the chief of police finds that the basis for denial of the renewal license has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date denial became final.

SEC. 41A-9. SUSPENSION.

The chief of police shall suspend a license for a period not to exceed 30 days if the determines that a licensee or an employee of licensee has:

(1) violated or is not in compliance with Section 41A-7, 41A-12, 41A-13, 41A-15, 41A-16, 41A-17, 41A-18, 41A-19, or 41A-20 of this chapter;

(2) engaged in excessive use of alcoholic beverages while on the sexually oriented business premises;

(3) refused to allow an inspection of the sexually oriented business premises as authorized by this chapter;

(4) knowingly permitted gambling by any person on the sexually oriented business premises;

(5) demonstrated inability to operate or manage a sexually oriented business in a peaceful and law-abiding manner thus necessitating action by law enforcement officers.

SEC. 41A-10. REVOCATION.

(a) The chief of police shall revoke a license if a cause of suspension in Section 41A-9 occurs and the license has been suspended within the preceding 12 months.

(b) The chief of police shall revoke a license if he determines that:

(1) a licensee gave false or misleading information in the material submitted to the chief of police during the application process;

(2) a licensee or an employee has knowingly allowed possession, use, or sale of controlled substances on the premises;

(3) a licensee or an employee has knowingly allowed prostitution on the premises;

(4) a licensee or an employee knowingly operated the sexually oriented business during a period of time when the licensee's license

was suspended;

(5) a licensee has been convicted of an offense listed in Section 41A-5(a)(10)(A) for which the time period required in Section 41A-5(a)(10)(B) has not elapsed;

(6) on two or more occasions within a 12-month period, a person or persons committed an offense occurring in or on the licensed premises of a crime listed in Section 41A-5(a)(10)(A), for which a conviction has been obtained, and the person or persons were employees of the sexually oriented business at the time the offenses were committed;

(7) a licensee or an employee has knowingly allowed any act of sexual intercourse, sodomy, oral copulation, masturbation, or sexual contact to occur in or on the licensed premises. The term "sexual contact" shall have the same meaning as it is defined in Section 21.01, Texas Penal Code; or

(8) a licensee is delinquent in payment to the city for hotel occupancy taxes, ad valorem taxes, or sales taxes related to the sexually oriented business.

(c) The fact that a conviction is being appealed shall have no effect on the revocation of the license.

(d) Subsection (b)(7) does not apply to adult motels as a ground for revoking the license.

(e) When the chief of police revokes a license, the revocation shall continue for one year and the licensee shall not be issued a sexually oriented business license for one year from the date revocation became effective. If, subsequent to revocation, the chief of police finds that the basis for the revocation has been corrected or abated, the applicant may be granted a license if at least 90 days have elapsed since the date the revocation became effective. If the license was revoked under Subsection (b)(5), an applicant may not be granted another license until the appropriate number of years required under Section 41A-5(a)(10)(B) has elapsed since the termination of any sentence, parole, or probation.

SECTION 41A-11. APPEAL.

If the chief of police denies the issuance of a license, or suspends

or revokes a license, he shall send to the applicant, or licensee, by certified mail, return receipt requested, written notice of his action and the right to an appeal. The aggrieved party may appeal the decision of the chief of police to a permit and license appeal board in accordance with Section 2-96 of this code. The filing of an appeal stays the action of the chief of police in suspending or revoking a license until the permit and license appeal board makes a final decision. If within a 10 day period the chief of police suspends, revokes, or denies issuance of a dance hall license or public house of amusement license for the same location involved in the chief's actions on the sexually oriented business license, then the chief may consolidate the requests for appeals of those actions into one appeal.

SEC. 41A-12. TRANSFER OF LICENSE.

A licensee shall not transfer his license to another, nor shall a licensee operate a sexually oriented business under the authority of a license at any place other than the address designated in the application.

SEC.41A-13. LOCATION OF SEXUALLY ORIENTED BUSINESSES.

(a) A person commits an offense if he operates or causes to be operated a sexually oriented business within 1,000 feet of:

(1) a church;

(2) a public or private elementary or secondary school;

(3) a boundary of a residential district as defined by the Dallas Development Code;

(4) a public park adjacent to a residential district as defined by the Dallas Development Code; or

(5) the property line of a lot devoted to residential use.

(b) A person commits an offense if he causes or permits the operation, establishment, substantial enlargement, or transfer of ownership or control of a sexually oriented business.

(c) A person commits an offense if he causes or permits the operation, establishment, or maintenance of more than one sexually oriented business in the same building, structure, or portion thereof, or the increase of floor area of any sexually oriented business in any building,

structure, or portion thereof containing another sexually oriented business.

(d) For the purposes of Subsection (a), measurement shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises where a sexually oriented business is conducted, to the nearest property line of the premises of a church or public or private elementary or secondary school, or to the nearest boundary of an affected public park, residential district, or residential lot.

(e) For purposes of Subsection (b) of this section, the distance between any two sexually oriented businesses shall be measured in a straight line, without regard to intervening structures or objects, from the closest exterior wall of the structure in which each business is located.

(f) Any sexually oriented business lawfully operating on June 18, 1986, that is in violation of Subsections (a), (b), or (c) of this section shall be deemed a nonconforming use. The nonconforming use will be permitted to continue for a period not to exceed three years, unless sooner terminated for any reason or voluntarily discontinued for a period of 30 days or more. Such nonconforming uses shall not be increased, enlarged, extended or altered except that the use may be changed to a conforming use. If two or more sexually oriented businesses are within 1,000 feet of one another and otherwise in a permissible location, the sexually oriented business which was first established and continually operating at a particular location is the conforming use and the later-established business(es) is nonconforming.

(g) A sexually oriented business lawfully operating as a conforming use is not rendered a nonconforming use by the location, subsequent to the grant or renewal of the sexually oriented business license, of a church, public or private elementary or secondary school, public park, residential district, or residential lot within 1000 feet of the sexually oriented business. This provision applies only to the renewal of a valid license, and does not apply when an application for a license is submitted after a license has expired or has been revoked.

SEC. 41A-14. EXEMPTION FROM LOCATION RESTRICTIONS.

(a) If the chief of police denies the issuance of a license to an ap-

plicant because the location of the sexually oriented business establishment is in violation of Section 41A-13 of this chapter, then the applicant may, not later than 10 calendar days after receiving notice of the denial, file with the city secretary a written request for an exemption from the locational restrictions of Section 41A-13.

(b) If the written request is filed with the city secretary within the 10-day limit, a permit and license appeal board, selected in accordance with Section 2-95 of this code, shall consider the request. The city secretary shall set a date for the hearing within 60 days from the date the written request is received.

(c) A hearing by the board may proceed if at least two of the board members are present. The board shall hear and consider evidence offered by any interested person. The formal rules of evidence do not apply.

(d) The permit and license appeal board may, in its discretion, grant an exemption from the locational restrictions of Section 41A-13 if it makes the following findings:

(1) That the location of the proposed sexually oriented business will not have a detrimental effect on nearby properties or be contrary to the public safety or welfare;

(2) That the granting of the exemption will not violate the spirit and intent of this chapter of the city code;

(3) That the location of the proposed sexually oriented business will not downgrade the property values or quality of life in the adjacent areas or encourage the development of urban blight;

(4) That the location of an additional sexually oriented business in the area will not be contrary to any program of neighborhood conservation nor will it interfere with any efforts of urban renewal or restoration; and

(5) That all other applicable provisions of this chapter will be observed.

(e) The board shall grant or deny the exemption by a majority vote. Failure to reach a majority vote shall result in denial of the exemption. Disputes of fact shall be decided on the basis of a preponderance of the evidence. The decision of the permit and license appeal board is final.

(f) If the board grants the exemption, the exemption is valid for one year from the date of the board's action. Upon the expiration of an exemption, the sexually oriented business is in violation of the locational restrictions of Section 41A-13 until the applicant applies for and receives another exemption.

(g) If the board denies the exemption, the applicant may not re-apply for an exemption until at least 12 months have elapsed since the date of the board's action.

(h) The grant of an exemption does not exempt the applicant from any other provisions of this chapter other than the locational restrictions of Section 41A-13.

SEC. 41A-15. ADDITIONAL REGULATIONS FOR ESCORT AGENCIES.

(a) An escort agency shall not employ any person under the age of 18 years.

(b) A person commits an offense if he acts as an escort or agrees to act as an escort for any person under the age of 18 years.

SEC. 41A-16. ADDITIONAL REGULATIONS FOR NUDE MODEL STUDIOS.

(a) A nude model studio shall not employ any person under the age of 18 years.

(b) A person under the age of 18 years commits an offense if he appears in a state of nudity in or on the premises of a nude model studio. It is a defense to prosecution under this subsection if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

(c) A person commits an offense if he appears in a state of nudity or knowingly allows another to appear in a state of nudity in an area of a nude model studio premises which can be viewed from the public right of way.

(d) A nude model studio shall not place or permit a bed, sofa, or mattress in any room on the premises, except that a sofa may be placed in a reception room open to the public.

SEC. 41A-17. ADDITIONAL REGULATIONS FOR ADULT THEATERS AND ADULT MOTION PICTURE THEATERS.

(a) The requirements and provisions of Chapter 46 of this code remain applicable to adult theaters and adult motion picture theaters.

(b) A person commits an offense if he knowingly allows a person under the age of 18 years to appear in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(c) A person under the age of 18 years commits an offense if he knowingly appears in a state of nudity in or on the premises of an adult theater or adult motion picture theater.

(d) It is a defense to prosecution under Subsections (b) and (c) of this section if the person under 18 years was in a restroom not open to public view or persons of the opposite sex.

SEC.41A-18. ADDITIONAL REGULATIONS FOR ADULT MOTELS.

(a) Evidence that a sleeping room in a hotel, motel, or similar commercial establishement has been rented and vacated two or more times in a period of time that is less than 10 hours creates a rebuttable presumption that the establishment is an adult motel as that term is defined in this chapter.

(b) A person commits an offense if, as the person in control of a sleeping room in a hotel, or motel, or similar commercial establishment that does not have a sexually oriented business license, he rents or subrents a sleeping room to a person and, within 10 hours from the time the room is rented, he rents or subrents the same sleeping room again.

(c) For purposes of subsection (b) of this section, the terms "rent" or "subrent" mean the act of permitting a room to be occupied for any form of consideration.

SEC. 41A-19. REGULATIONS PERTAINING TO EXHIBITION OF SEXUALLY EXPLICIT FILMS OR VIDEOS.

(a) A person who operates or causes to be operated a sexually oriented business, other than an adult motel, which exhibits on the

premises in a viewing room of less than 150 square feet of floor space, a film, video cassette, or other video reproduction which depicts specified sexual activities or specified anatomical areas, shall comply with the following requirements:

(1) Upon application for a sexually oriented business license, the application shall be accompanied by a diagram of the premises showing a plan thereof specifying the location of one or more manager's stations and the location of all overhead lighting fixtures and designating any portion of the premises in which patrons will not be permitted. A manager's station may not exceed thirty-two (32) square feet of floor area. The diagram shall also designate the place at which the permit will be conspicuously posted, if granted. A professionally prepared diagram in the nature of an engineer's or architect's blueprint shall not be required; however each diagram should be oriented to the north or to some designated street or object and should be drawn to a designated scale or with marked dimensions sufficient to show the various internal dimensions of all areas of the interior of the premises to an accuracy of plus or minus six inches. The chief of police may waive the foregoing diagram for renewal applications if the applicant adopts a diagram that was previously submitted and certifies that the configuration of the premises has not been altered since it was prepared.

(2) The application shall be sworn to be true and correct by the applicant.

(3) No alteration in the configuration or location of a manager's station may be made without the prior approval of the chief of police or his designee.

(4) It is the duty of the owners and operator of the premises to ensure that at least one employee is on duty and situated in each manager's station at all times that any patron is present inside the premises.

(5) The interior of the premises shall be configured in such a manner that there is an unobstructed view from a manger's station of every area of the premises to which any patron is permitted access for any purposes excluding restrooms. Restrooms may not contain video reproduction equipment. If the premises has two or more manager's stations designated, then the interior of the premises shall be con-

figured in such a manner that there is an unobstructed view of each area of the premises to which any patron is permitted access for any purpose from at least one of the manger's stations. The view required in this subsection must be by direct line of sight from the manager's station.

(6) It shall be the duty of the owners and operator, and it shall also be the duty of any agents and employees present in the premises to ensure that the view area specified in Subsection (5) remains unobstructed by any doors, wall, merchandise, display racks or other materials at all times that any patron is present in the premises and to ensure that no patron is permitted access to any area in which patrons will not be permitted in the application filed pursuant to Subsection (1) of this section.

(7) The premises shall be equipped with overhead lighting fixtures of sufficient intensity to illuminate every place to which patrons are permitted access at an illumination of not less than one (1.0) footcandle as measured at the floor level.

(8) It shall be the duty of the owners and operator and it shall also be the duty of any agents and employees present in the premises to ensure that the illumination described above, is maintained at all times that any patron is present in the premises.

(b) A person having a duty under Subsections (1) through (8) of Subsection (a) above commits an offense if he knowingly fails to fulfill that duty.

SEC. 41A-20. DISPLAY OF SEXUALLY EXPLICIT MATERIAL TO MINORS.

(a) A person commits an offense if, in a business establishment open to persons under the age of 17 years, he displays a book, pamphlet, newspaper, magazine, film, or video cassette, the cover of which depicts, in a manner calculated to arouse sexual lust or passion for commercial gain or to exploit sexual lust or perversion for commercial gain, any of the following:

(1) human sexual intercourse, masturbation, or sodomy;

(2) fondling or other erotic touching of human genitals, pubic region, buttocks, or female breasts;

(3) less than completely and opaquely covered human genitals,

buttocks, or that portion of the female breast below the top of the areola; or

(4) human male genitals in a descernibly turgid state, whether covered or uncovered.

(b) In this section "display" means to locate an item in such a manner that, without obtaining assistance from an employee of the business establishment:

(1) it is available to the general public for handling and inspection; or

(2) the cover or outside packaging on the item is visible to members of the general public.

SEC. 41A-21. ENFORCEMENT.

(a) Except as provided by Subsection (b), any person violating Section 41A-13 of this chapter, upon conviction, is punishable by a fine not to exceed $1,000.

(b) If the sexually oriented business involved is a nude model studio or sexual encounter center, then violation of Section 41A-4(a) or 41A-13 of this chapter is punishable as a Class B misdemeanor.

(c) Except as provided by Subsection (b) any person violating a provision of this chapter other than Section 41A-13, upon conviction, is punishable by a fine not to exceed $200.

(d) It is a defense to prosecution under Section 41A-4(a), 41A-13, or 41A-16(d) that a person appearing in a state of nudity did so in a modeling class operated:

(1) by a proprietary school licensed by the state of Texas; a college, junior college, or university supported entirely or partly by taxation;

(2) by a private college or university which maintains and operates educational programs in which credits are transferrable to a college, junior college, or university supported entirely or partly by taxation; or

(3) in a structure:

(A) which has no sign visible from the exterior of the structure and no other advertising that indicates a nude person is available

for viewing; and

(B) where in order to participate in a class a student must enroll at least three days in advance of the class;

(C) where no more than one nude model is on the premises at any one time.

(e) It is a defense to prosecution under Section 41A-4(a) or Section 41A-13 that each item of descriptive, printed, film, or video material offered for sale or rental, taken as a whole, contains serious literary, artistic, political, or scientific value.

SEC. 41A-22. INJUNCTION.

A person who operates or causes to be operated a sexually oriented business without a valid license or in violation of Section 41A-13 of this chapter is subject to a suit for injunction as well as prosecution for criminal violations.

SEC. 41A-23. AMENDMENT OF THIS CHAPTER.

Sections 41A-13 and 41A-14 of this chapter may be amended only after compliance with the procedure required to amend a zoning ordinance. Other sections of this chapter may be amended by vote of the city council.

SECTION 2. That Section 31-24, "Prohibiting Display of Sexually Explicit Material to Minors," of CHAPTER 31, "OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended, is repealed.

SECTION 3. That Section 31-26, "Prohibiting Operation of Certain Enterprises in Specified Areas," of CHAPTER 31," OFFENSES-MISCELLANEOUS," of the Dallas City Code, as amended, is repealed.

SECTION 4. That Resolution Number 86-1010, adopted by the City Council March 26, 1986, imposing a moratorium on building permits and certificates of occupancy, is repealed.

SECTION 5. That the terms and provisions of this ordinance are severable and are governed by Section 1-4 of CHAPTER 1 of the Dallas City Code, as amended.

SECTION 6. That all persons required by this chapter to obtain a

sexually oriented business license are hereby granted a grace period, beginning June 18, 1986, and ending July 18, 1986, in which to make application for the license.

SECTION 7. That this ordinance shall take effect immediately from and after its passage and publication in accordance with the provisions of the Charter of the City of Dallas, and it is accordingly so ordained.

APPROVED AS TO FORM:

ANALESLIE MUNCY, City Attorney

By

/s/ Mark K. O'Briant

Assistant City Attorney

Passed and correctly enrolled June 18, 1986